

Richard Allen Cuevas

NAME
T-26470

PRISON NUMBER

430 Alta Road, F1-B5-Cell 217up

CURRENT ADDRESS OR PLACE OF CONFINEMENT

San Diego CA, 92179-9001

CITY, STATE, ZIP CODE

2254	1983
FILING FEE PAID	
Yes	No
HYP MOTION FILED	
Yes	No
COPIES SENT TO	
Court	ProSe

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ORIGINAL
 APR -9 PM 4:15
 CLERK US DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 BY BM DEPUTY

**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

Richard Allen Cuevas

(FULL NAME OF PETITIONER)

PETITIONER

v.

Robert J. Hernandez

(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

Jerry Brown

The Attorney General of the State of
California, Additional Respondent.Civil No. **'08 CV 0647 J NLS**
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
 BY A PERSON IN STATE CUSTODY

- Name and location of the court that entered the judgment of conviction under attack: San Diego Superior Court, 220 W. Broadway, P.O. Box 122724
- Date of judgment of conviction: July 30, 2001
- Trial court case number of the judgment of conviction being challenged: SCD154691
- Length of sentence: 13 YEARS

CR

5. Sentence start date and projected release date: August 23, 2001 - Feb.
22, 2012 (EPRD)
6. Offense(s) for which you were convicted or pleaded guilty (all counts):
(I) Attempted Murder with Great Bodily Injury and use of a
deadly weapon/ 664/187(a), 12022.7(a), 12022 (b)(1)
7. What was your plea? (CHECK ONE)
 (a) Not guilty ☐
 (b) Guilty ☒
 (c) Nolo contendere ☐
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
 (a) Jury ☐
 (b) Judge only ☐
9. Did you testify at the trial?
☐ Yes ☐ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?
☐ Yes ☒ No
11. If you appealed in the California Court of Appeal, answer the following:
 (a) Result: _____
 (b) Date of result, case number and citation, if known: _____

 (c) Grounds raised on direct appeal: _____

12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:
 (a) Result: _____
 (b) Date of result, case number and citation, if known: _____

 (c) Grounds raised: _____

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

- (a) Result: _____
- (b) Date of result, case number and citation, if known: _____
- _____
- (c) Grounds raised: _____
- _____
- _____
- _____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

☒ Yes ☐ No

15. If your answer to #14 was "Yes," give the following information:

- (a) California Superior Court Case Number: HC 17091 (3rd Petition), SCD 154691
- (b) Nature of proceeding: Habeas Corpus
- _____
- (c) Grounds raised: Due Process, CUNNINGHAM V. U.S. SUPREME COURT
- _____
- _____
- (d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (e) Result: _____
- (f) Date of result: _____

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

☒ Yes ☐ No

17. If your answer to #16 was "Yes," give the following information:

- (a) **California Court of Appeal** Case Number: D051088
- (b) Nature of proceeding: Habeas Corpus
- (c) Grounds raised: Due Process, CUNNINGHAM V. U.S. SUPREME COURT
- (d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (e) Result: _____
- (f) Date of result: _____

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?

☒ Yes ☐ No

19. If your answer to #18 was "Yes," give the following information:

- (a) **California Supreme Court** Case Number: S155731
- (b) Nature of proceeding: Habeas Corpus
- (c) Grounds raised: Due Process, CUNNINGHAM V. U.S. SUPREME COURT
- (d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (e) Result: _____
- (f) Date of result: _____

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court containing the grounds raised in this federal Petition, explain briefly why you did not:

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your first federal petition for writ of habeas corpus challenging this conviction?

☒ Yes ☐ No (If "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? _____

(i) What was the prior case number? _____

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: _____

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

TABLE OF AUTHORITIES

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Cases...

People v. Coronado (1995) 12 Cal 4th, 145

People v. Esquibel (2006) 49 CR 3rd, 393

People v. Tillotson (2007) DJDAR 17736

People v. Williams (2004) 34 Cal 4th, 397, 402

CA Rules of Court, Rule (4420e)

GROUND FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** PETITIONER WAS IMPROPERLY SENTENCED TO THE UPPER TERM

BASED UPON THE DISCRETION OF THE SENTENCING JUDGE WITHOUT A JURY FINDING

OF FACT TO THE AGGRAVATING FACTORS. PURSUANT TO THE RECENT U.S. SUPREME

Supporting FACTS (state *briefly* without citing cases or law) (Cont. See Attached)

On August 23, 2001, Petitioner Richard Allen Cuevas, Case No. SCD154691 was sentenced to 13 years, without a jury finding the truth of the aggravating factors that were utilized to attain the upper term on the single charge of 667/187(a). Upon review of this petition of Habeas Corpus, by the Superior Court of San Diego (See exhibit (C)), the Court contends that by "Stipulating to the Sentence," Petitioner admitted that there were aggravating factors justifying the imposition of the upper term. Petitioner insists that in the transcripts (see exhibit (B)), there are ^{MORE} mitigating factors specified throughout the text versus the aggravating factors that were relied upon to justify an imposition of an upper term. Moreover, if any factors that were utilized in the court's discretion to reach it's selection of the upper term can only have been the enhancement of Great Bodily Injury which carries 3 years, that was already included in the plea bargain, thus creating an invalid usage of such factor in arriving at the aggravated sentence of 9 years for the charge of 667/187(a), due to the fact that an underlying enhancement cannot do double duty; it cannot be used to impose an upper term sentence and, on top of that an enhanced term (Penal Code 1170(B)).

The sentencing Judge solely upon his discretion found the aggravating merited the upper term. The U.S. Supreme Court found such a departure to be error. The sentencing Judge, it was found, did not have such a discretion.

Did you raise **GROUND ONE** in the California Supreme Court? (See attached)

☒ Yes ☐ No.

1 (GROUNDS FOR RELIEF CONTINUED)
2 RULING IN CUNNINGHAM V. CALIFORNIA, SUCH ERROR REQUIRES CORRECTION
3 OF THIS ERROR OF SENTENCE.
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1 (Supporting Facts continued)

2 (see attached Abstract of Judgement, exh. (A)). The sentencing Judge
3 did not have a Juries determination for the aggravating factor nece-
4 ssary for the Judge to impose the upper term legally. It was the
5 Judges ministruals duty, absent a Juries finding to submit a
6 "Seperate concise Statement of the ultimate facts," (Rule 4420e)
7 which is absent from Petitioners sentencing procedure (see exhibit
8 (B)).

9 Petitioner respectfully requests that this error be corrected
10 and the mid-term be applied to his sentence. Petitioner may waive
11 a Jury trial during plea bargain procedures, but not his Consti-
12 tutional rights to Due Process. Absent a Jury, the Judge had specific
13 duties which required neither discretion to set the upper term without
14 complying with these duties. A right to a Jury trial imposes all
15 these rights to Petitioner and duties for the Judge.

16 Petitioner requests a new, corrected and modified Abstract of
17 Judgement reflecting this changed, with all applicable credits being
18 applied to his time served and pre-sentence time served reflected.

19 Petitioner is not rescinding his plea bargain nor is requesting
20 to have his plea bargain dismissed/withdrawn. He simply requests
21 to have his sentence corrected to reflect the finding in Cunningham.

22 Cunningham has been interpreted by multiple State Appellate
23 Courts in California and has been interpreted in different manners.
24 Some Judges are agreeing with the U.S. Supreme Court such as in
25 (People v. Tillotson 2007), that sole discretion of a sentencing
26 Judge has been vacated of their power to utilize factors presented
27 before the court to enhance and aggravate a term.

28 In no particular instance were the Judges given the authority

1 (Supporting facts, P.3)

2 to use their own discretion when imposing an aggravated sentence.

3 All aggravating factors, according to the Cunningham ruling must
4 be presented to a Jury in order to be proven "beyond a reasonable
5 doubt."

6 In the (People v. Tillotson) case Tillotson contends that
7 imposing an enhancement twice constitutes an unauthorized sentence.
8 Petitioner of this Writ also contends that this argument is also
9 having a bearing on his confinement. (People v. Coronado, 1995),
10 explains the two types of sentence enhancements; (1) Those that go
11 to the nature of the offender, that in this particular instance is
12 null and void, being that this is Petitioners first and only offense,
13 in either Juvenile or Adult jurisdictions; (2) Those that go to the
14 nature of the offense, this second method of applying an enhancement
15 is being occupied to aggravate the charge of 667/187(a) as well as
16 serving a concurrent duty in the form of Great Bodily Injury and
17 the use of a deadly weapon. Therefore, as stated in
18 (People v. Williams, 2004), this status enhancement may only be im-
19 posed once in arriving at an aggregate sentence.

20 Petitioner further contends that "A defendant does not forfeit
21 or waive a legal argument that was not recognized at the time of
22 sentencing, (People v. Esquibel, 2006). Henceforth, because the
23 sentencing Judge imposed an upper term sentence on the single count
24 of 187(a), without finding it to be true beyond a reasonable by a
25 Jury, the error is to be viewed as not being harmless to the Pe-
26 titioner, and that the sentence be modified in light of Cunningham
27 as requested throughout the California Appellate Courts.
28

23. Do you have any petition or appeal now pending in any court, either state or federal, pertaining to the judgment under attack?

☐ Yes ☒ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: _____

(b) Case Number: _____

(c) Date action filed: _____

(d) Nature of proceeding: _____

(e) Grounds raised: _____

(f) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: _____ Francis J. Bardsley

_____ San Diego California

(b) At arraignment and plea: _____ SAME AS ABOVE

(c) At trial: _____ NA

(d) At sentencing: _____ SAME AS ABOVE

(e) On appeal: _____

(f) In any post-conviction proceeding: _____ ~~NA~~ PRO PER

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

PRO PER

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

☐ Yes ☒ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

☐ Yes ☐ No

28. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____

3-3-2008

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

3-3-2008

(DATE)



SIGNATURE OF PETITIONER

S155731

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RICHARD ALLEN CUEVAS on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

FEB 13 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Richard Allen Cuevas

Hernandez, et al

2008 APR -9 PM 4: 23

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(EXCEPT IN U.S. PLAINTIFF CASES ONLY)

BY Rm DEPUTY

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Richard Allen Cuevas
480 Alta Road
San Diego, CA 92179
T-26470

ATTORNEYS (IF KNOWN)

'08 CV 0647 J NLS

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | |
|----------------------------|----------------------------|---|----------------------------|----------------------------|
| PT | DEF | | PT | DEF |
| <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Citizen of This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Citizen of Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Citizen or Subject of a Foreign Country | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |
| | | Incorporated or Principal Place of Business in This State | | |
| | | Incorporated and Principal Place of Business in Another State | | |
| | | Foreign Nation | | |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> Marine <input type="checkbox"/> Miller Act <input type="checkbox"/> Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 195 Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury-Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Tort to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input checked="" type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights			

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

Docket Number

DATE April 9, 2008

SIGNATURE OF ATTORNEY OF RECORD

CR 21 149593 \$5.00 4/9/08

Rm

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

**# 149593 - SH
* * C O P Y * *
April 09, 2008
16:19:39**

Habeas Corpus

USAO #.: 08CV0647
Judge...: NAPOLEON A JONES, JR
Amount.:
Check#.: STCA015-131780 \$5.00 CK

Total-> \$5.00

FROM: RICHARD ALLEN CUEVAS